In the Supreme Court of the United States.

OCTOBER TERM, 1904.

FREDERICK W. LINCOLN, HENRY W. PEABODY, JOHN R. BRADLEE, and CHARLES D. BARRY, trading as copartners under the firm name and style of Henry W. Peabody & Co., plaintiffs in error,
v.
THE UNITED STATES. } No. 149.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

WARNER, BARNES & CO., LIMITED, appellant,
v.
THE UNITED STATES. } No. 466.

APPEAL FROM THE COURT OF CLAIMS.

PETITION OF THE UNITED STATES FOR REHEARING.

I respectfully present to the court a petition for rehearing in this cause, and urge, in view of the paramount importance of the principles of sovereignty and constitutionality involved, that the court should hear

new and fuller argument from the Government for the following reasons:

I.

The court rested the decision in these cases upon the *Fourteen Diamond Rings* case. While accepting fully the ruling in that case, and the decision that the Philippine insurrection did not make the territory *foreign* as to our own tariff, the argument for the Government proceeded on the conviction that the imperative demands of the warfare in that domestic *hostile* territory and the scope of the executive power under the war head distinguish that case fundamentally from the present cases. The court holds here that the President's tariff order of July 12, 1898, expired by its own terms when the war with Spain was at an end. It is difficult to see why, because the exercise of the war power was initiated under a foreign war, it ceases at the end of that war and does not extend on into a much more serious war, simply because the territory was domestic. To entertain this view, it seems to me, is to disregard the doctrines laid down in the Civil War cases which unqualifiedly sustain the exercise of executive power for which the Government contends in dealing with an insurrectionary war in domestic territory

It is respectfully submitted that the Executive order was not "a power in blank for any military occasion which might turn up in the future," as suggested by the court. If subordinate officers took advantage of a President's order to wrest it from its true purpose as a blank power, this suggestion would be apposite. The

occasion demanded the continuance of the provisions of the order; the *post*-treaty aspect was an integral part of the entire situation in the Philippines, with its requirements and consequences fully foreseen, and was not therefore a casual sequel to suit which the order was being wrested from its true purpose with doubtful legality. The President consciously and intentionally imposed the order on the new war and was not misled into unknowingly giving an authority in blank. There can not be the slightest doubt about this. The commanding general and the subordinate officers acted at all times in strict accordance with the Executive orders.

It is suggested, with deference, that the court in the opinion herein did not lay down fully the legal and logical principles by which, notwithstanding the Civil War cases, the war power was limited to the existence of the war which first called it forth, and did not continue on into the far more serious and extensive war which followed, merely because the territory ceased to be "foreign." So much for the military necessity for the order throughout the period of insurrection. The deliberate continuance and the deliberate intent of Congress to approve, as shown by review in serial detail of executive and legislative acts, remain for consideration.

II.

The stress of the case appears now to rest upon the intention of Congress in the authorizing and ratifying acts and the effect of these acts. The Government is convinced, for many reasons which it desires to lay

more fully before the court, that Congress in passing these acts intended to ratify all that was done by the executive authorities in the Philippines, and particu larly the collection of duties during the period in question. The grounds for this view have already been stated, but are susceptible of reinforcement. Heretofore the Government has supposed that there could not be the slightest doubt of the intent of Congress; that the only inquiry was as to the effect of its enactments.

It will be necessary to set forth the series of executive orders on the one hand and the series of legislative acts on the other. The court is familiar with the terms of the President's tariff order of July 12, 1898. I point out first one or two orders consequent thereon *before* ratification of the treaty, in order to complete the showing of continuity of executive order throughout, followed by precisely responsive action of the subordinate officers.

Founded upon an order of the President, promulgated by the War Department, General Orders No. 6 of the military governor, dated Manila, September 29, 1898, suspended the enforcement of tariff regulations under the order of July 12, 1898, until November 10, 1898, and continued during the interim the existing Spanish tariff, omitting the preference to Spain.

General Orders No. 10 of the military governor of October 26, 1898, formally directed that the amended and revised tariff should be put in force on November 10, and set forth the regulations for the entrance and clearance of vessels, light dues, entry of merchandise, etc., with schedules of duties on imports.

The order of the President, dated December 21, 1898, and promulgated by the War Department January 16, 1899, as Circular No. 4 of the Division of Customs and Insular Affairs, contained this paragraph:

> All ports and places in the Philippine Islands in the actual possession of the land and naval forces of the United States will be opened to the commerce of all friendly nations. All goods and wares not prohibited for military reasons by due announcement of the military authority will be admitted upon payment of such duties and other charges as shall be in force at the time of their importation.

While this contemplated the existing war with Spain, there is nothing in it inconsistent with its continuance during the necessary military situation which began before the war with Spain was definitely ended by the treaty ratification. Indeed, the war with Spain was really over when this order of December 21, 1898, was issued; the protocol was agreed upon August 12, 1898, and the treaty was signed December 10, 1898. That paragraph is harmonious with the fact of commerce partially opened to friendly nations, notwithstanding the insurrection, and is harmonious with the continued collection of tariff duties.

Other executive orders followed relating to the compilation of customs reports and additions to the Philippine free list.

After the treaty was ratified the action was as follows:

On May 3, 1899 (Tariff Circular No. 65, War Department, May 5, 1899), the President directed that

the Philippine Archipelago and the island of Guam shall constitute a collection district, with Manila as the chief port of entry, directed the assignment of an army officer as collector, established certain subports of entry, provided for the deposit of moneys collected with the treasurer of the islands, and that all questions arising in the administration of customs shall be referred to the collector for his decision, with the right of appeal to the Secretary of War. This order was promulgated at Manila, August 10, 1899 (General Orders, No. 37, of the military governor), and military officers were directed to "carefully consider and promptly comply with all instructions affecting them."

Two other orders at this particular time are also significant. On May 8, 1899, President McKinley signed an order, promulgated by the War Department on May 11 (Circular No. 20, Division of Customs and Insular Affairs), directing that "by virtue of the authority vested in me as Commander in Chief of the Army and Navy of the United States," certain offices shall be created and maintained "during the maintenance of the military government of the United States in the islands of the Philippine Archipelago and the island of Guam," including the office of assistant auditor for auditing the accounts of the Department of Customs.

On May 11, 1899 (Circular No. 16, Division of Customs and Insular Affairs), the War Department published for the information and guidance of all concerned the direction that—

> Collectors of customs appointed by the military authorities of the United States at ports in territory under military government are hereby directed to perform the duties formerly belonging to United States consuls or consular officers in such territory, so far as concerns seamen, vessels, clearances, etc.

Official fees and dues collected on this account were ordered to be deposited and accounted for as prescribed for customs collections.

General Orders, No. 49, of the military governor, dated October 23, 1899, provided as follows:

> The customs tariff and regulations promulgated in general orders of 26th of *last October*, from this office, having been amended from time to time since that date, the following revised printed schedule of the same, which contains all amendments to September 1, last, is published for the information and guidance of all concerned.

The President's letter of instructions to the Philippine Commission of April 7, 1900, transferred from the military governor of the islands to the Commission "that part of the power of government in the Philippine Islands which is of a legislative nature * * * until Congress shall otherwise provide."

> Exercise of this legislative authority will include the making of rules and orders, having the effect of law, for the raising of revenue by taxes, customs duties, and imposts. * * *

It is entirely certain from the language of the President and the whole course of events that after the rati-

fication of the treaty and until September 1, 1900, "that part of the power of government in the Philippine Islands which is of a legislative nature" was exercised by the purely military authorities—that is, by the President acting through the officers of the Army. That was clearly the President's intention, understanding, and practice, founded on the belief that the war power was ample and its exercise necessary.

Various orders of the military governor promulgated from time to time, which need not be mentioned more specifically here, amended and revised the "United States provisional customs tariff and regulations for the Philippine Islands."

In the autumn of 1900 the Philippine Commission began to exercise its legislative power relative to the island tariff, and the separation of the civil from the military authority was initiated, the two authorities cooperating and sharing in the separation and evolution of the respective functions; e. g., General Orders, No. 16, military governor, dated February 15, 1901, promulgates certain regulations prepared under section 2 of the Philippine Commission's act of January 26, 1901 (1 Pub. Laws Philippine Com., p. 107), amending section 22 of the provisional customs tariff.

The act of February 28, 1901, of the Philippine Commission recites the order of the President of February 23, 1901, amending the order of May 8, 1899, already referred to, which provided for auditing officers, and enacts rules and instructions relative to the accounting system, "by authority of the President of

the United States and with the concurrence and approval of the Secretary of War first had," etc. This was the form of the enacting clause of the Commission's acts at first, which was changed by the act of Congress of July 1, 1902, to read: "By authority of the United States, be it enacted by the Philippine Commission."

On June 21, 1901, the President issued the order (promulgated in the Philippines as General Orders, No. 49, military governor, dated June 22) appointing the president of the Philippine Commission civil governor of the Philippines.

The transfer and cooperation of power is shown by military orders of July 20, 1901 (G. O., No. 179), and August 15, 1901 (G. O., No. 219). The former provided that in unorganized territory, as in organized provinces or parts thereof under military jurisdiction, revenue officers should discharge their duties as insular officers, reporting direct to the civil government. The latter directed that customs officers should be assisted in their duties by quartermasters' boats so far as possible without interference with the needful work of the Army.

In addition to the acts of the Philippine Commission above referred to the Commission passed two laws respecting the tariff up to the date of the act of Congress of March 8, 1902—a customs administrative act (February 6, 1902, 1 Pub. Laws Philippine Commission, 788), and an appropriation act which appropriated for the refund of "customs duties, fines,

penalties, and forfeitures mitigated or remitted by competent authority."

It does not seem possible to doubt the continuous intention of the Executive and the strict obedience of his subordinates respecting the war tariff. The duties on imports from the United States was always part of it.

During all the period of the war of the insurrection Congress passed laws which manifested their understanding of the situation in the Philippines and their approval of the necessary military measures taken to meet it. These were for the most part appropriation acts providing men and munitions, e. g., act of March 2, 1899 (30 Stat., 977, 981); act of March 3, 1899 (30 Stat., 1064); act of May 26, 1900 (31 Stat., 205); act of March 1, 1901 (31 Stat., 847); act of March 2, 1901 (31 Stat., 895).

The "Spooner Amendment" (act of March 2, 1901, 31 Stat., 910), which provided that "all military, civil, and judicial powers necessary to govern the Philippine Islands" should be "vested in such person and persons and shall be exercised in such manner as the President of the United States shall direct," etc., manifestly related to the period *after* ratification and necessarily implied a recognition of the exercise of executive power, including the imposition of this tariff, before the passage of that act, and authorized and approved the continuance of the existing measures thereafter.

The act of March 8, 1902 (32 Stat., 54), "temporarily to provide revenue for the Philippine Islands,"

etc., continued in force the provisions of the Philippine Commission act of September, 1901, revising and amending the tariff laws of the Philippines, and specifically provided for the collection of duties upon articles coming into the Philippine Archipelago from the United States.

Thus the Philippine tariff, initiated under the original Executive order, and continued after ratification by similar orders, recognized and authorized by the Spooner Amendment, and adopted and established by the Philippine Commission proceeding under the amendment and their "Instructions," was expressly imposed and continued by Congress, with approving recognition of the fact that the duties had continuously theretofore been duly imposed.

The act of July 1, 1902 (32 Stat., 691), providing a civil government for the Philippine Islands, "approved, ratified, and confirmed" the action of the President in creating the Philippine Commission "and authorizing said Commission to exercise the powers of government to the extent and in the manner and form and subject to the regulation and control set forth in the instructions of the President to the Philippine Commission," etc.; approved, ratified, and confirmed the action of the President as set forth in his order of July 12, 1898, "together with the subsequent amendments of said order," and approved "the action of the authorities of the government of the Philippine Islands, taken in accordance with the provisions of said order and subsequent amendments."

The opinion of the Supreme Court herein declares that in this series of authorizations and ratifications by Congress the only act needing mention is this final act of July 1, 1902; that the act ratifies the President's action, taken by virtue of his authority as commander in chief, and that the language, "the actions of the authorities of the government of the Philippine Islands, taken in accordance with the provisions of said order and subsequent amendments, are hereby approved" is confined as to its approving force to those actions "which were in accordance with the provisions of the order, which, as we have already intimated, the collection of these duties was not."

There was no meaning or purpose in Congress ratifying what the commander in chief did under the war power during the Spanish war and up to the ratification of the treaty, because that action of the Executive needed no ratification, as the long-established rules of public law and the decisions of this court show. These settled doctrines were before Congress when the ratifying acts were passed. The act of March 8, 1902, which specifically imposed and continued the Philippine tariff, recognized by its terms that those schedules had continuously theretofore been imposed by the island authorities, and therefore when the act of July 1, 1902, ratified in such express and detailed terms the entire series of Executive acts, specifying the tariff collections, it is impossible to concede or conceive that Congress only intended to ratify what the Executive could validly do under the war power during the period

between the date of the Executive order in July, 1898, and the ratification of the treaty in April, 1899.

The opinion also says that the President's order "plainly was an order intended to deal with imports from foreign countries only and Philippine ports not in the actual military control of the United States." The order directs the collection of duties upon the occupation of any ports and places in the Philippine Islands. General Orders, No. 10, of October 26, 1898, which framed regulations and schedules, applied to *every* vessel and *any* cargo, and by specific language included within this category vessels from ports of the United States. By exempting from port charges and duties supplies and materials for the use of the United States, that order created a necessary inference that other merchandise from the United States was to be taxed—manifestly the bulk of army and navy supplies would come and did come from the United States.

All of the insular cases were decided by the Supreme Court long before the final validating acts of 1902. It seems very certain that by these acts Congress confirmed *all* the Executive actions in the Philippines. There can be no doubt that the President undertook to proceed respecting the Philippine tariff, and proceeded, after the treaty was ratified, precisely as he did before, and that at all times the military and civil governors, the commanding general, and the subordinate military and civil officers acted under and in accordance with the Executive orders with exact obedience and strict response to their terms. When these trans-

actions—that is, the actions of the Executive and the acts of Congress—are exhibited in their continuity and interdependence, to say that Congress did not *intend* to ratify what was done beyond the President's acts as commander in chief *during the Spanish war*, appears not to reckon with the facts. I repeat that Congress knew that *that* action of the Executive needed no ratification whatever, and therefore its action was a legislative approval of *all* the war measures continued after the treaty ratification, including the war tariff. The court will understand that the Government also rests (in this application for reargument) on the war power as competent during the whole period, and has sought to establish that ratification was not necessary at all. But at this point—after the treaty took effect—Congress, out of abundance of caution, might have conceived that some doubt existed, and legislated accordingly.

The Government earnestly desires the opportunity of arguing those propositions again and more at length before the court.

Without magnifying possible dangers, it is evident, I think, that while the opinion of the court strikes down only the tariff on merchandise from the United States, the legality of the entire structure of civil government after the ratification of the treaty is involved and may be denied hereafter relative to other features not now presented or foreseen, if the court adheres unqualifiedly to the logic of this opinion.

The court would not regard as controlling either the large amount of money involved or the fact that the

claimants added the duties to the price of their goods. But it is worth while to point out (as accentuating the great importance of this case) that the refunds called for under the decision of the court will reach the sum of seven million dollars, and that this vast sum will be paid in large part to claimants, many of them aliens, who, as public records show, were on the whole opposing rather than supporting the authority of the United States.

HENRY M. HOYT,
Solicitor-General.

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In the Supreme Court of the United States.

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v.
THE UNITED STATES. } No. 466.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF OF THE ATTORNEY-GENERAL ON PETITION FOR REHEARING.

The very heavy burden of millions of dollars which the decision in this cause previously rendered will impose upon the United States for money which never came into its Treasury, impels me to file an additional brief upon the subject of ratification alone. While I concur in everything the Solicitor-General in the main

petition for rehearing has said, it has seemed to me wise to bring to the attention of the court in a somewhat different way the facts of the case as throwing light upon the construction which the act of Congress of the 1st of July, 1902, must have. I therefore venture to invite the attention of the court to a review of the history of the period covered by the payment of these taxes and the confirmatory legislation.

STATEMENT OF FACTS.

On July 12, 1898, there then being a state of war between the United States and Spain in the Philippines, President McKinley, as commander in chief, directed that upon occupation of any ports or places in the Philippine Islands by the forces of the United States an accompanying tariff of duties and taxes should be levied and collected as a military contribution, and that regulations for its administration should take effect and be in force in ports and places occupied.

He required by this order that questions arising under the tariff should be decided by the commanding general of the forces in the Philippines, and that accurate accounts of the collections should be kept and rendered to the Secretary of War. On the 13th of August the city of Manila was captured, and the next day the custom-house was opened and taxes were collected according to the old Spanish tariff in force in the islands before the American occupation, and this tariff continued to be enforced until November 10, 1898. By order of the Secretary of War the order of July 12, 1898, was suspended until

November 10, 1898, when "the Customs Tariff and Regulations for Ports in the Philippine Islands in Possession of the United States" (substantially the same as those originally accompanying the order of July 12, 1898) were put in force. Such "Customs Tariff and Regulations," amended and revised, were issued by the military governor in General Orders No. 10, Manila, October 26, 1898, to take effect November 10, 1898.

These regulations expressly applied to vessels and cargoes from ports of the United States in respect of the production of a manifest certified by the United States collector at port of sailing. Section 19 imposed as a harbor charge a charge of 8 per cent on the value, as per schedule, of all merchandise, free or dutiable imported into the Philippines and 10 per cent additional on the amount of the import duty; "but merchandise imported or exported for the use of the Government of the United States, including coal, shall be exempt from this charge." Section 22 provided that all supplies and materials for the use of the Army and Navy of the United States should, under suitable restrictions, be admitted without payment of duty. At the close of the schedule of import and export duties was the following sentence: "The duty, percentum of duty, surtax, consumption, tonnage tax, wharf and warehouse charges, and all the charges herein provided for shall be collected in uniform manner regardless of the country of the origin or exportation of merchandise to Philippine ports in the possession of the United States, and all decrees and orders to the contrary are rescinded."

Under these customs and tariff regulations duties were levied on all goods coming into the Philippines from the United States except those which were exempt, as above quoted, and accounts of the collectors were regularly forwarded to the Secretary of War and the President, who never objected to the same. In December, 1898, the "Customs Tariff and Regulations" prescribed to take effect November 10, 1898, was amended, by striking out two words, by order of the military governor. On April 10, 1899, two months after the Senate ratified the treaty of Paris, nearly two months after the Queen Regent ratified the treaty for Spain, and only one day before ratifications were exchanged and the treaty was finally proclaimed, the acting Secretary of War, by direction of the President, added a paragraph to the "Customs Tariff and Regulations" for the Philippine Islands then in force, by virtue of the order of July 12, 1898. Is it possible that the President issued this order of April 10, 1899, intending its operation to cease the next day? Less than one month later, May 3, 1899, the President issued an executive order reciting that by virtue of the authority vested in him as Commander-in-Chief of the Army and Navy he directed that during the occupancy by the military authorities of the United States of the islands of the Philippine Archipelago and the island of Guam said islands should constitute a collection district for customs purposes. The order made Manila the chief port of entry and Iloilo and Cebu subports, provided for the detail of an officer of the Army as col-

lector, authorized the opening of subports from time to time by the Secretary of War, directed that all moneys should be deposited in the treasury of the islands, and ordered that all questions arising in the administration of the customs should be referred to the collector of the islands for his decision, with an appeal in cases referred by the collector, to the Secretary of War. Now, this order of May 3, 1899, is wholly ineffective and meaningless unless construed as an amendment of the order of July 12. It was issued by the President in the same capacity as Commander in Chief as that in which he issued the order of July 12, 1898. It referred to the duties to be collected in the ports in the occupancy of the military authorities of the United States, and it necessarily assumed the existence and continuing application of a tariff schedule which, of course, could only be the one accompanying and made part of the order of July 12, 1898, and amended as late as April 10 previous, by order of the President. Not only is this the natural and inevitable construction of the executive order of May 3, 1899, but it actually received that construction by the Secretary of War and military governor and was enforced as such by them, and they continued to assess duties on goods coming from the United States, as well as from elsewhere, not only with full knowledge and approval of the President, who made all these orders, but also, as we shall see, with the full knowledge of Congress. On October 23, 1899, the military governor, for convenience, published the "Cus-

toms Tariffs and Regulations" promulgated October 26, 1898, with all the amendments down to September 1, 1899, and added: "Upon the occupation of any ports or places in the Philippine Islands by the forces of the United States not as yet in United States occupancy this order will be proclaimed and enforced."

By reference to Senate Document 171 (submitted herewith), which was a letter from the Secretary of War in response to Senate resolution of January 22, 1902, transmitting copies of all correspondence between the War Department or any official thereof and any person or corporation relating to the customs tariff affecting the Philippine Islands adopted by the Philippine Commission, we find an inquiry made of the Secretary of War by an American firm dated October 2, 1899, as to the duty imposed on American whisky entering the Philippine Islands, a reference of the inquiry by the Secretary to the military governor, and an answer by the collector of customs returned to the Secretary of War, that the classification undoubtedly discriminates against American whiskies of a certain class, but that it does not check their importation. The same document contains a petition, dated April 20, 1899, by American merchants in the Philippines to the Chamber of Commerce of San Francisco, asking a reduction of duties which had since American occupation been imposed on American goods imported into the islands, and complaining of discrimination against American goods. This petition was forwarded to the President, and by him referred to the War Department, and by it to the

islands, and returned with an indorsement, dated October 7, 1899, of the military governor, stating in effect that uniform duties were imposed on goods imported from Spain and the United States. The same document shows a continuing correspondence and discussion concerning the tariff between the military governor and the Secretary of War, extending from April, 1899, until June, 1900, when the Secretary of War directed the military governor to appoint a board to revise "the United States provisional customs tariff and regulations for those islands" (p. 34, Doc. 171—see also General Orders No. 80, June 9, 1900). The report of this board was transmitted to the Philippine Commission on the 29th of August, 1900 (see Doc. 171 p. 35), with the direction that the new tariff as recommended by the Commission should be submitted to the Secretary of War for his action, and after approval by him that a promulgating order would be issued putting it in force. December 29, 1900, the new tariff bill recommended by the Commission was forwarded by the chairman to the Secretary of War. That contained as its section 9 the following:

> Importations from the United States are dutiable under the provisions of this act, but no customs duties shall be imposed on articles, goods, and merchandise transported only from one place or port to another place or port in the Philippine Islands.

This was not introducing a new policy, but was only an explicit declaration of that which had been enforced under the existing a... The proposed tariff reached

the Secretary of War in February and was ordered printed by him. (Doc. 171, p. 159.) Then followed a long correspondence between interested American merchants and the Secretary of War in regard to the tariffs. In one of the letters to the chairman of the Philippine Commission (Doc. 171, pp. 284, 285), dated March 21, 1901, written by the Chief of the Insular Bureau, it is said, "Confidentially, I might add the Secretary does not desire any promulgation of the finally determined Philippine tariff before the decision of the Supreme Court in the Porto Rican case is handed down." On May 27 the Porto Rican cases were decided.

As soon as the opinion was received and construed, the Secretary of War sent June 28, 1901, the following cable dispatch (now on file in the War Department) to the chairman of the Commission at Manila:

JUNE 8, 1901.

TAFT, *Manila:*

Supreme Court holds that uniformity of duties clause of constitution does not apply to government of islands ceded by Spain; that Congress has power to impose customs duties on imports from Porto Rico, and that such duties levied under the Foraker Act are lawful. The court also holds that imposition of duties on merchandise imported from the United States into Porto Rico before the cession was a valid exercise of the President's power as military commander, and that the same duties imposed after the cession and before the passage of the Foraker Act were invalid, because the

United States having both title by cession and peaceable possession, Porto Rico ceased to be a foreign country within the terms of the Dingley tariff. The court did not decide the case raising the question of the power of Congress to impose duties in Porto Rico on imports from the United States, which is objected to as constituting an export tax in violation of Constitution, article 1, section 9. The court did not decide the case which raised the question of the right of the President to impose duties in the United States, under the Dingley act, upon merchandise imported from the Philippine Islands after the ratification of the treaty of Paris. The most obvious distinction between the status of Porto Rico and the Philippines, after the cession, indicated in the opinions of the court, is in the fact that Porto Rico was at the time of cession in full peaceable possession, while a state of war has continued in the Philippines.

As the question of the President's power to impose duties in the Philippine Islands under the existing conditions of military occupation has not been decided by the court, the President has determined to continue to impose duties as heretofore. We hope for further decisions by the Supreme Court shortly after it meets in October and before the meeting of Congress. The revision of the Philippine tariff, proposed by you, will be considered in a few days. The temporary suspension of legislation in Edwards's dispatch of June 1 is removed.

ROOT, *Sec. War.*

Sent straight 6.15 p. m. Sq.

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On the 3d of July, 1901, the Secretary of War, by order of the President, approved the new tariff bill prepared by the Commission and revised in the War Department and forwarded it to the Philippine Commission July 24, 1901. The tariff was finally enacted by the Philippine Commission September 17, 1901, and was put in force by its terms November 15, 1901. It was act No. 230 of the Philippine Commission and was entitled "An act to revise and amend the tariff laws of the Philippine Archipelago." The enacting clause is as follows: "By the authority of the President of the United States and with the approval of the Secretary of War first had, be it enacted by the United States Philippine Commission."

Section 1 of the act is as follows:

> SECTION 1. The provisions of General Orders No. 49, office of the United States military governor in the Philippine Islands, dated October 23, 1899, relating to customs duties on imports and exports of the Philippine Islands and tonnage duties and wharf charges therein, and the several orders supplemental thereto and amendatory thereof, are hereby amended to read as follows:

General Order No. 49 was an order promulgating the tariff duties imposed by order of the President of July 12, 1898, as amended and revised down to September 1, 1899. On the 2d of December, 1901, the case of the Fourteen Diamond Rings (183 U. S., 176), involving the right to impose duties on goods received from the Philippine Islands, was decided and no dis-

tinction was admitted to exist between the Philippines and Porto Rico. On December 13, 1901, the Ways and Means Committee submitted a Philippine tariff bill for enactment, with a report in which they said (H. R. Report No. 4, 57th Congress, 1st session):

> This bill is designed to raise revenue for the government and benefit of the Philippine Archipelago. It is intended to restore the status which existed prior to the late decision of the Supreme Court in the case of the diamond rings, rendered on the second day of the present month. Prior to that decision the Government had been collecting duties on goods coming into the United States from the Philippine Archipelago at the same rates as those provided in our tariff laws for like articles imported from "foreign countries." The court holds that the Philippine Archipelago is not a foreign country and therefore the general law does not apply. This bill extends the rate now existing upon imports from foreign countries to articles brought in from the Philippine Islands. In the Philippine Archipelago when it came into our possession under the treaty of Paris the Spanish laws for the collection of tariff were in force. These were continued with various modifications from time to time until the enactment of "An act to revise and amend the tariff laws of the Philippine Archipelago" by the United States Philippine Commission.

The same report was made by the Senate Committee on the Philippines, and thereafter, on March 8, 1902 (32 Stats., 54), Congress enacted "That the pro-

visions of an act entitled 'An act to revise and amend the tariff laws of the Philippine Archipelago,' enacted by the United States Philippine Commission on the 17th day of September, 1901, *shall be and remain in full force and effect*, and there shall be levied, collected, and paid upon all articles coming into the Philippine Archipelago from the United States the rates of duty which are required by the said act to be levied, collected, and paid upon like articles imported from foreign countries into said archipelago."

About the time of the passage of this act and for months thereafter evidence was taken by both Houses as to the conditions in the Philippine Islands, and it was made known to the House and Senate that suits were likely to be brought to recover moneys paid on goods imported from the United States into the Philippine Islands. (See hearings before House Committee on Insular Affairs, evidence of Wm. H. Taft, p. 139; hearings before Senate Committee on Philippines, evidence of William H. Taft, pp. 149–154.) The proceedings of the military governor, the Army, the Commission, the instructions to it by President McKinley, and all that was done in the islands under American occupancy were brought to the notice of Congress and special attention was given to the needs of the islands for income and the expenditures.

The instructions of the President to the Philippine Commission dated April 7, 1900, conferred *quasi*-civil legislative authority of wide scope upon the Commission as the legislature of a military government, and among other powers was this:

> Exercise of this legislative authority will include the making of rules and orders having the effect of law for the raising of revenue by taxes, custom duties, and imposts. * * *

Finally, as the result of six months' discussion and hearing, Congress passed on July 1, 1902 (32 Stats., 691), the act entitled "An act temporarily to provide for the administration of the affairs of civil government in the Philippine Islands, and for other purposes," and the first two sections were evidently intended to confirm and satisfy all that the President and his subordinates in the islands had done without Congressional sanction. The two sections were as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the action of the President of the United States in creating the Philippine Commission and authorizing said Commission to exercise the powers of government to the extent and in the manner and form and subject to the regulation and control set forth in the instructions of the President to the Philippine Commission, dated April seventh, nineteen hundred, and in creating the offices of civil governor and vice-governor of the Philippine Islands, and authorizing said civil governor and vice-governor to exercise the powers of government to the extent and in the manner and form set forth in the executive order dated June twenty-first, nineteen hundred and one, and in establishing four executive departments of government

in said islands as set forth in the act of the Philippine Commission, entitled "An act providing an organization for the departments of the interior, of commerce and police, of finance and justice, and of public instruction," enacted September sixth, nineteen hundred and one, is hereby approved, ratified, and confirmed, and until otherwise provided by law the said islands shall continue to be governed as thereby and herein provided, and all laws passed hereafter by the Philippine Commission shall have an enacting clause as follows: "By authority of the United States be it enacted by the Philippine Commission." The provisions of section eighteen hundred and ninety-one of the Revised Statutes of eighteen hundred and seventy-eight shall not apply to the Philippine Islands.

Future appointments of civil governor, vice-governor, members of said Commission, and heads of executive departments shall be made by the President, by and with the advice and consent of the Senate.

SEC. 2. That the action of the President of the United States heretofore taken by virtue of the authority vested in him as Commander in Chief of the Army and Navy, as set forth in his order of July twelfth, eighteen hundred and ninety-eight, whereby a tariff of duties and taxes as set forth by said order was to be levied and collected at all ports and places in the Philippine Islands upon passing into the occupation and possession of the forces of the United States, *together with the subsequent amendments of*

said order, are hereby approved, ratified, and confirmed, and the action of the authorities of the government of the Philippine Islands, *taken in accordance with the provisions of said order and subsequent amendments*, are hereby approved: Provided, That nothing contained in this section shall be held to amend or repeal an act entitled "An act temporarily to provide revenue for the Philippine Islands, and for other purposes," approved March eighth, nineteen hundred and two.

ARGUMENT.

The foregoing statment shows the facts and circumstances under which Congress passed section 2 of the act of July 1, 1902. The question was whether Congress had by section 2 ratified the collection of the sum sought to be recovered in this suit. Mr. Justice Holmes answers the question as follows:

> We see no sufficient ground for saying that the collection of these duties has been ratified by Congress. The only act needing mention is that of July 1, 1902 (chapter 1369, section 2, 32 Stat., 691, 692). The act ratifies the action of the President heretofore taken by virtue of the authority vested in him as Commander in Chief of the Army and Navy, as set forth in his order of July 12, 1898, etc., together with the subsequent amendments to that order; and the actions of the authorities of the government of the Philippine Islands taken in accordance with the provisions of said order and subsequent amendments are hereby approved. Without considering how far the first part of the section

> extends, the approval of the action of the authorities is confined to those which were in accordance with the provision of the order, which, as we already have intimated, the collection of these duties was not. See further *De Lima* v. *Bidwell*, 182 U. S., 1, 199, 200.

It is difficult to follow the reasoning of the learned justice. The section approves "the actions of the government of the Philippine Islands" "taken in accordance with the provisions of said order *and subsequent amendments*." He says that "the approval of the action of the authorities is confined to those which were in accordance *with the order* which, as we have already intimated, the collection of these duties was not." With deference, the approval is not confined to those actions in accordance with the order, but is expressly and *ex industria* extended to include those which were taken in accord *with subsequent amendments*. Is it possible that actions taken in accord with subsequent amendments are to be excluded from the remedial effect of the statute because they were not in accord with the original order? Why add the words subsequent amendments at all? It is true the words are in accordance "with the said order *and* subsequent amendments," but I submit that it is an unheard of construction to treat "order *and* subsequent amendments" in any other than a distributive sense so that its meaning shall cover actions in accord either with the original order *or* its amendments. Look at the matter a little differently. Assume actions taken when the original order was in force in which case they

must have been in accordance with the original order to come within the ratification. Assume them taken when the order was modified by subsequent amendments in which case they must have been in accord with the order as subsequently amended. The order and subsequent amendments were not in force at the same time. The amendments necessarily modified the order and actions taken in accord with the amendments when in force were necessarily in accord with the order *and* the subsequent amendments, i. e., with the order as amended.

By previous discussion in the opinion the learned justice limits the effect of the original order of July 12, 1898, to the period of the war with Spain preceding the peace and construed it not to justify the imposition of duties upon goods coming from the United States, and so it followed if actions approved by section 2 were limited to those taken in accordance with the original order the duties in question were not within the ratification. It is very difficult to reconcile this construction of the order with the language of the schedule of duties which accompanied the order, and was as much the act of the President as the order itself, especially wherein it is recited as follows:

> The duty, per centum of duty, surtax, consumption, tonnage, tax, wharf, and warehouse charges and all the charges herein provided for, shall be collected in uniform manner, regardless of the country of origin or exportation of merchandise to Philippine ports in possession of the United States and all decrees and orders to the contrary are rescinded.

When this is shown to have been construed to justify duties on merchandise from the United States by every official from the President down, and even the complainants here have not contended otherwise, for they have brought no suit for taxes imposed during the war, it makes the meaning of the language still more clear.

But even conceding such a construction of the order of July 12, 1898, to be correct (though, as we have seen, it is in the teeth of the actual construction which the President put on it), on the ground that only in this way can the action of the President be squared with his lawful powers, we must abandon this rule of construction when we come to consider those subsequent amendments of the order that were, according to the opinion of the court, plainly *ultra vires* and not to be reconciled with his powers. As we have seen, the President, through the Secretary of War, amended the customs regulations under the order of July 12, 1898, by order of April 10, 1899. Then the treaty had been ratified by both powers and these ratifications were to be exchanged the next day. Is such a Presidential order consistent with the view that he intended the amended order to cease to have effect the next day?

Take again the order of May 3, 1899, which plainly continued the order of July 12, 1898, modifying it in some respects, but giving force to its schedules long after the Spanish war had ended and the treaty of cession was ratified. What construction is that to have for purposes of ratification but the construction

which President McKinley intended it to have, what his officers gave it with his knowledge, and what he subsequently approved as the proper construction. Under such circumstances it is, of course, impossible to restrain the meaning of an order from its natural one to square with delegated authority when the conflict between the two is irreconcilable by reasoning however strained. The only conclusion is—indeed the natural conclusion is—that the legislative power recognizing the lack of authority intended to supply it by ratification. I confess myself unable to see why the court should decline to follow what is so plain that he that runs may read. We must then have recourse to the ordinary rule of construction which is to follow the intention of the person making the order, and when we can ascertain his intention by what was done under the order with his approval we are clearly right in adopting that as its true meaning. The statement of facts will have utterly failed in its purpose if it does not show that by the order of May 3, 1899, the President intended to amend the order of July 12, 1898, by treating it in force after the war and by continuing it with a few amendments, that he intended thereby to impose duties on goods coming from the United States and that the collection of duties accordingly was known to him and approved by him. Furthermore, the statement of facts shows that Congress knew of these subsequent amendments to the order of July 12, 1898, and knew that the President had intended the collection of the taxes as they were collected on goods coming from the United

States. In the light of these facts known to Congress, it is impossible to construe the Congressional approval of section 2 as covering less than the collections made under the subsequent amendments to the order of July 12, 1898, with the approval of the President, or the taxes in suit.

The question of ratification is a question of intention to be determined by the language of the ratification in the light of the circumstances. Congress was here ratifying an order of the President, and its amendment and acts done in pursuance of them. Acts done in pursuance of a President's order are usually those acts which the President intended to authorize, and when the facts show that he actually approved the acts done they tend strongly to show that he intended to authorize them, and therefore that they were intended to be ratified by Congress.

I ought to add that a narrow construction of section 2 is wholly unjustified when the character of the legislation of which it is a part is considered. Congress was fully advised that President McKinley, both in Porto Rico and in the Philippines, was without guide or precedent in his policy; that he had to pioneer; that, while Congress came to his rescue early in respect to Porto Rico, he was left substantially for three years without Congressional assistance, and that in carving a path through a new forest, in assuming responsibilities which he could not shift, he might have adopted, and, in the light of the decisions of this court, he did adopt methods which

were beyond his powers for want of Congressional sanction. When Congress examined closely what he had done, it approved and it determined to make up for its lack of aid and its hardly excusable timidity in action by a generous ratification of what he had done. This is perfectly plain from the first section, and I submit it is wrenching the plain purpose and meaning of Congress in dealing with the second section to use dialectics to prevent its having any meaning or force at all.

The reasoning of the opinion certainly justifies the conclusion that it was not intended to put the decision of this case on the ground that Congress could not ratify by subsequent act the collection of the duties here sought to be recovered. It is true that in the case of *De Lima* v. *Bidwell*, to which reference is made in this opinion, there is an *obiter dictum* to the effect that Congress could not ratify the collection of taxes imposed without previous authority after a suit had been brought to recover such taxes. It is submitted that under the decisions in the case of *Mattingly* v. *District of Columbia* (97 United States, 687), and in *Hamilton* v. *Dillin* (21 Wallace, 73, 96), it is distinctly ruled that Congress has the power to validate the collection of taxes which were invalid by reason of a failure of Congress to act when collected. If this be true, then it is respectfully urged that there is no logical distinction between the ratification of the collection of such taxes before and after suit brought. The objection can not be that the ratification after suit brought disturbs

vested rights to recover the taxes, because the right is just as much vested under principles of constitutional law before as after suit brought. The bringing of a suit does not change the nature of the right, and it is not until judgment is recovered that its nature can be said to be changed. The real ground for the decision in *De Lima* v. *Bidwell* was that sustained by the authorities cited, to wit, that the presumption in respect of ambiguous legislation claimed to affect previously existing rights is ordinarily against its being retroactive; but such presumption of course can not obtain in case of an express ratification like this on its face intended to be retroactive. It is submitted that the real limitation upon the power of Congress to ratify the collection of taxes, or any other act as against third persons, is that between the time of the unauthorized act and of the ratification nothing shall have occurred changing the situation of the person affected by the ratification, so that by reason of the ratification he is put in a worse position than he would have been if the act had been previously authorized. If not, there would seem to be no reason why ratification should not have its full operation; and in this case and in this class of cases there is the strongest reason why ratification should apply. Here what is protested against, and what is sought to be made the basis of the recovery, is a general construction of a customs law having the effect of raising the prices of goods imported so that the plaintiffs, the merchants who are importing them, have been able to reimburse themselves for the

duties paid in the additional price of the goods. It is no hardship on them, therefore, that the taxes, though originally erroneously assessed, should be made legal by subsequent enactment; and the mere difference between a right to recover before suit brought and after suit brought makes an arbitrary distinction with no logical foundation at all.

Even if we assume that the distinction suggested in *De Lima* v. *Bidwell*, as to the lack of power of Congress to ratify the collection of taxes after suit brought in assumpsit to recover them back is sound and that the judgment herein should therefore be for the complainants, it is nevertheless of the utmost importance to the Government that this be established as the real ground for the decision rather than a construction of the second section of the act of July 1, 1902, as not intending to ratify the collection of taxes like those in suit; a construction which we hope we have shown and respectfully contend to be unsupported by the facts and the law. The reason for the importance to the Government of the ground upon which this case is to be decided, if it must be decided in favor of the complainants, is that there are doubtless claims amounting to more than a million dollars, on which suit was not brought before July 1, 1902, the date of the ratifying act, but upon which suits have been and will be brought in view of the present decision of the court. For these reasons we think it of the utmost importance to the Government that an opportunity should be given for a reargument,

in which the question of construction and ratification may be given a much fuller consideration, in view of all the history of this legislation, than, as it is respectfully submitted, it has heretofore had.

WILLIAM H. MOODY,
Attorney-General.

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